IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE T.R.RAMACHANDRAN NAIR

TUESDAY, THE 10TH APRIL 2007 / 20TH CHAITHRA 1929

WP(C).No. 25171 of 2006(V)

PETITIONER:

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1. DR.T.BEERMASTHAN, THARAMANNIL HOUSE,
   EDAVANA P.O., MALAPPURAM DIST.

2. DR.SHAMLA PADIYATH,
   "SHABNAM" PADIYATH, KAVIL WEST,
   KODUNGALLUR, THRISSUR DIST.

BY ADV. SRI.KALEESWARAM RAJ

RESPONDENTS:

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1. STATE OF KERALA, REPRESENTED BY
   SECRETARY TO GOVERNMENT, DEPARTMENT OF HEALTH &
   FAMILY WELFARE, SECRETARIAT, THIRUVANANTHAPURAM.

2. THE DIRECTOR OF INDIAN SYSTEMS
   OF MEDICINE, THIRUVANANTHAPURAM.

3. KERALA PUBLIC SERVICE COMMISSION,
   REPRESENTED BY THE SECRETARY,
   KERALA PUBLIC SERVICE COMMISSION,
   PATTOM, THIRUVANANTHAPURAM.

R1 & R2 BY G.P. SHRI P.A. SALIM
R3 BY ADV. SRI.P.C.SASIDHARAN, SC, KPSC

THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD ON 7/3/2007, THE COURT ON 10.4.2007 DELIVERED THE FOLLOWING:

APPENDIX

EXT.P1-TRUE COPY OF THE RANKED LIST PUBLISHED BY THE KPSC

EXT.P2-TRUE COPY OF ROTATION CHART PREPARED AS PER THE RULES BY THE KPSC

EXT.P3-TRUE COPY OF THE CHART PUBLISHED BY THE PSC WHICH APPEARED IN MATHRUBHUMI THOZHIL VARTHA DATED 16.9.2006

EXT.P4-TRUE COPY OF THE DETAILS REGARDING ADVICE AND APPOINTMENT FROM CANDIDATES WITH TURN NO.49 TO 91 IN TWO UNITS.

// TRUE COPY //\\

P.S TO JUDGE

T.R. Ramachandran Nair, J.

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W.P.(C).NO.25171 OF 2006-V

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Dated this the 10th day of April, 2007

JUDGMENT

The petitioners in the writ petition are candidates who had applied for the post of Medical Officer (Ayurveda) in the Indian System of Medicine, pursuant to the notification issued by the Public Service Commission. They are respectively rank Nos. 17 and 18 in the supplementary list for Muslims in Ext.P1 rank list, which came into force on 31.12.2005.

2. The petitioners have approached this court mainly contending that the principles of reservation and communal rotation have not been properly followed by the Commission while advising candidates from the rank list and the supplementary list. According to them when 250 candidates have been advised in total, their turn had also arrived but they have not been advised. It is averred that even though 30 candidates had to be advised from the supplementary list for Muslims, only 28 have been advised thus resulting in a deficiency of two. Petitioners have produced Exts.P2 and P3 to supplement their contentions as raised above. In paragraph 3 of the writ petition and in ground 'A' the petitioners have clearly averred that in the general merit, candidate Nos.1, 8, 28, 50, 82 and 111 belonged to Muslim

community and only against rank Nos.1 and 8 advice memos were issued from general merit but rank Nos.28, 50, 82 and 111 were given memos by including them in the reservation category. According to the petitioners, this had resulted in denial of appointment to four candidates in the supplementary list. The said argument is reiterated in ground 'A' also.

3. At the time of hearing of the writ petition, learned counsel for the petitioners contended for the position that candidates who are eligible to be appointed from their own merit in the open category cannot be counted against the reservation points and there is total failure by the Commission to follow the principles stated in Rules 14 and 17 of K.S. & S.S.R.

4. In the counter affidavit filed by the Commission, they have averred that a total of 268 candidates have been advised till 24.11.2006 and the petitioners were not advised as their turn for advice did not arise against the reported vacancies. In paragraph 3, the details of ranks upto which candidates have been advised against OC-BC turn are given. The Commission denied the allegation that there is violation of Rules 14 to 17 of KS & SSR and it is contended that the advice memos have been issued strictly in accordance with the rotation worked out. It is also stated that rank No.8 was advised against 'OC' turn and other Muslim candidates included in the Main list of the ranked list were advised against “BC' turns reserved for Muslims as per rules in vogue.

5. The petitioners subsequently filed I.A. NO.1415/2007 seeking to direct the Commission to file an additional counter affidavit showing the manner in which the principles of reservation and communal rotation have been followed in respect of the appointments made to the post in question. The Commission has thereafter filed an additional counter affidavit on 7.3.2007 elaborating the processes undertaken. It is stated therein that in working out the rotation for the previous selection to the post in question, the rotation ended at MR VIII 39 OC. In the present selection the rotation started from MR VIII 40 OBC and ended at MR XI 7 OC while working out the rotation for the 267 fresh vacancies reported. It is stated that a total of 287 candidates were advised as on 13.2.2007 from the present ranked list out of which 267 are fresh and 20 are NJD vacancies reported. Paragraph 3 gives the details of vacancies reported during the present selection and the turn in which rotation started and ended at each stage of working out the rotation. It is followed by the details of candidates belonging to Muslim community advised from the rank list. As regards the contention raised by the petitioners, it is stated that temporary pass over turn to keep up the 50% rule is to be filled up first and rank number 1 was advised to the temporary pass over turn. It is averred that during the previous selection there are temporary pass over turn to keep up 50% rule and one of the turn is that of Muslim and hence it is filled up first. It is submitted that in relation to rank

No.8, that candidate was advised to the open competition turn and rank No.28 was advised to the turn of 46 Muslim and he got advice earlier than advise to an OC turn. It is also stated that when the turn of Muslim arises it cannot be kept vacant till an OC turn arises as that turn can be filled up only by Muslim candidate included in the rank list and this is the matter in the case of rank Nos.50, 82 and 111 as well. The answer to the contentions of the petitioners are elaborated in paragraph 6 in the following terms:

> "It is submitted that a community candidate is entitled for both to OC turn or to community reservation turn and such candidates are to be advised to the earliest turn, either OC or BC turn in accordance with law. It is submitted that the advise are made strictly in terms of Rule 14 to 17 of the KS & SSR. The contention of the petitioner otherwise is totally untenable and does not have any legal backing also."

It is also pointed out in the additional counter affidavit that any change in the advice list will affect the candidates who have already been advised and appointed, including their seniority and that the petitioners have not impleaded any of the candidates as parties and therefore the writ petition is liable to be dismissed.

6. The issue raised in the writ petition will have to be examined in the light of the relevant rules contained in Rules 14 to 17 of KS & SSR. It is argued by the counsel for the petitioners that the Commission has considered or rather allotted candidates belonging to Muslim community who are eligible to be appointed in the open category to the reservation

turns which could not have been done. Relying upon the decisions of the Honourable Supreme Court in **R.K. Sabharwal and others v. State of Punjab and others (**AIR 1995 SC 1371) and **Union of India v. Satya Prakash** (2006 (2) KLT 375 (SC)) and the decision of a Division Bench of this court reported in **Life Insurance Corporation of India v. Wilson Georg**e (1997 (2) KLT 218), it is contended that the candidates who are eligible to be advised as open category cannot be advised to the turn of candidates eligible for reservation and that by the said method the community will lose the benefit of reservation. It is argued that a candidate who is eligible to be advised on his own merit in open category even though he is a Muslim, cannot be advised against a turn of Muslim who is eligible to be advised in the reservation turn.

7. Rule 14 of KS & SSR deals with reservation of appointments and Rule 14(b) is in the following terms:

> "(b) The claims of members of Scheduled Castes and Scheduled Tribes and Other Backward Classes shall also be considered for the appointments which shall be filled on the basis of merit and where a candidate belonging to a Scheduled Caste, Scheduled Tribe or Other Backward Class is selected on the basis of merit, the number of posts reserved for scheduled castes, scheduled tribes or for Other Backward Classes as the case may be, shall not in any way be affected."

Third proviso to sub-rule (c) is also extracted below:

> " Provided also that in preparing the list of eligible candidate to be appointed under this rule applying the rotations specified above in every cycle of 20 vacancies, the candidates eligible to be selected

> on open competition basis, that is, turns 1, 3, 5, 7, 9, 11, 13, 15, 17 and 19 shall be selected first and then the candidates for the reservation turns, out of those available in the ranked list in the particular groups having regard to their ranks. In finalising the select list any candidate of the same community selected on open competition turns, if found to be below in the order of the candidates selected from the same community on the basis of reservation, for the fixation of ranks as per rule 27 of these rules, candidates of the same community obtaining higher marks shall be interchanged with the candidates of the same community in the reservation turn for the purpose of ranking."

Rule 15 contains the provisions as to how the integrated cycle combining the rotation in Rule 14(c) and 17(2) has to be followed. Rule 15 (a) is extracted below:

> " The integrated cycle combining the rotation in clause © of rule 14 and the sub-rotation in sub rule (2) of rule 17 shall be as specified in the Annexure to this Part. If a suitable candidate is not available for selection from any particular community or group of communities specified in the Annexure, the said community or group shall be passed over and the post shall be filled up by a suitable candidate from the community or group of communities immediately next to the passed over community or group in the said Annexure in the order of rotation. If no suitable candidate is available for selection in any of the above communities or group of communities, selection shall be made from open competition candidates."

In view of the contention raised by the counsel for the Commission, the effect of Rule 15(c) has also to be considered. The said rule reads as follows:

> " The benefit of the turn forfeited to a particular community or to a group of community by reason of it being passed over under sub rules (a) and (b) shall be restored to it, at the earliest possible opportunity, if a suitable candidate from that particular community or group is available for selection by making adjustment against the claims of the particular community or group that derived the extra

benefit by reason of such passing over."

8. Going by Rule 14(b), candidates belonging to Scheduled Castes/Scheduled Tribes or Other Backward Classes if selected on the basis of merit, it shall not affect the number of posts reserved for Scheduled Castes/Scheduled Tribes or Other Backward Classes as the case may be. This is the important principle that governs the interpretation of Rules 14 to 17. Counsel for the Commission argued that the entire scheme covering Rules 14 to 17 forms a package and Rule 14(c) shall be read subject to the rules of rotation and the integrated cycle to be followed. It is contended by the counsel for the Commission that in view of Rule 15(c), when a particular community has forfeited the benefit of a turn, it shall be restored to it at the earliest possible opportunity and hence going by the integrated cycle, the first turn goes to a Muslim and it was filled up by rank No.1 and therefore there is no illegality in it. It is seen from the order of rotation given under Rule 14(c) that in every cycle of 20 vacancies, the first one is open competition. It is not disputed herein that candidates having rank Nos.1, 8, 28, 50, 82 and 111 were included in the general merit and they are Muslims. Going by the additional counter affidavit filed by the Commission, rank No.1 was considered against the pass over turn of Muslim and rank No.8 was advised to the open competition turn and rank Nos.28, 50, 82 and 111 were advised as belonging to Muslim Community.

9. It may also be relevant to note here, the purpose of preparing and publishing the ranked list and supplementary list. The said matter is dealt with in Kerala Public Service Commission Rules of Procedure. Rule 2 (g) contains the definition of Ranked list which reads that:

> "(g). "Ranked List" means list of candidates arranged in the order of merit, either on the basis of interview or examination or by both".

Rule 4(iv) empowers the Commission, to prepare a list in the order of merit of such number of candidates as the Commission may determine from time to time, where a written examination and/or a practical test is conducted by the Commission for recruitment to a service or post and the 2nd proviso enables the Commission to prepare such supplementary lists, for the purpose of satisfying the rules of reservation of appointment to Scheduled Castes, Scheduled Tribes and Other Backward Classes as found necessary in the order of merit of candidates belonging to such classes. Hence, it is evident and clear that candidates included in the supplementary list will be entitled to be appointed based on the rules of reservation, turns, etc. and in the quota available for each community."

10. The question is whether the method adopted by the Commission is in accordance with the rules. The relevant rules have been interpreted in various decisions of this court. Counsel for the petitioners particularly relied upon the Division Bench decision reported in **Life Insurance**

Corporation of India v. Wilson George (1997 (2) KLT 218), and that of a learned Single Judge in **K. Mohanan v. Secretary, KPSC and others (**ILR 1992 (2) Ker. 268). In contra, counsel for the Commission relied upon the decision of a learned Single Judge reported in **Joseph Zacharias v. KPSC** (2001 (3) KLT 362) which was affirmed by a Division Bench in **Pradeep v. Joseph Zacharias** (2001 (3) KLT 765) and also the decisions reported in **Ajeesh Kumar v. University of Kerala** (2001 (2) KLT 533) and **Sree Sankaracharya University of Sanskrit and others v. Prasanna Kumari and others** (ILR 1997 (1) Ker. 319. The question considered in 1997 (2) KLT 218 is similar to the facts of this case. The question considered was whether candidates belonging to Other Backward Classes who have secured more marks and whose names are included in the general merit, are entitled to selection only in the general merit quota and that they cannot be treated as reserved candidates for selection. The relevant clause 2 (b) of the instructions issued by the Ministry which came up for interpretation of the Bench was that "candidates belonging to Other Backward Classes recruited on the same standards prescribed for the general candidates shall not be adjusted against the reservation quota of 27%". The Division Bench, after considering the legal issue held in paragraphs 6 & 7 in the following terms:

> "6. ..... In other words, O.B.C. candidates who are ranked above and included in the general category candidates will be considered

> as candidates selected on merits and will not, therefore, be counted against the reserved vacancies. Candidates who got selection under the general quota will certainly be the persons who secured more marks in the selection or more meritorious than the candidates included in the reserved quota. But when the various points in the roster are filled up some of the candidates who secured lower position in the merit list will get appointment only at a lower stage and candidates belonging to reserved category may get appointment earlier.
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> 7. .....it is true that these respondents have secured more marks than the candidates included in the list of Other Backward Classes. But they got selection only in the general merit quota. Once their names are included in the general merit quota they cannot be treated as reserved candidates. The contention of the respondents' counsel that the instructions issued in Ext.R1(a) is only to the effect that candidates belonging to OBCs recruited on the basis of merit in open competition in general quota shall not be adjusted against the reservation quota of 27% and, therefore, these respondents can be appointed against reserved quota for OBCs and the seats left by the respondents in the general quota shall be filled by candidates belonging to Other Backward Classes. If this contention is accepted it will lead to a situation where Other Backward Classes will loose three seats whereby jeopardising the employment opportunities of the Other Backward Classes. If these respondents are treated as persons entitled to reservation intended for Other Backward Classes, three persons belonging to Other Backward Classes cannot be given appointments under the merit quota as they have not secured the marks required to be included in the general quota and the candidates who have secured higher marks than them can rightfully claim those posts as they are more meritorious than the OBC candidates. If the respondents' contention is accepted that would lead to a situation where there Backward Classes candidates are to be excluded from the list."

Ultimately, a direction was issued to treat the said candidates as general category candidates and to take appropriate decision while considering the question of seniority. Going by the principles stated in the above decision, it is clear that candidates who are included in the ranked list and who are

entitled to the OC turn, cannot be treated as reserved candidates for selection. The said principle is imported in statutory form in Rule 14(c) of the rules extracted above. Learned counsel also relied upon the decision reported in 2006 (2) KLT 375 (SC) to expand the same contention. That was a case relating to selection made by the U.P.S.C. for I.A.S., I.F.S., I.P.S. Grade A and Grade B. The question considered in paragraph 8 is whether the OBC candidates who were selected on merit and were placed in the list of open category candidates could still for the purpose of placement (preference) be considered to be Other Backward Classes candidates thereby exhausting the quota reserved for relaxed Other Backward Classes candidates from allocation of service. The scope of proviso to sub-rule 2 of Rule 16 of the Civil Services Examination Rules 1996 came up for consideration in that case. Under the said proviso "candidates belonging to Scheduled Castes, the Scheduled Tribes and Other Backward Classes who have been recommended by the Commission without resorting to the relaxed standard referred to in the sub-rule shall not be adjusted against vacancies reserved for Scheduled Castes, Scheduled Tribes and Other Backward Classes." Their Lordships mainly relied upon the dictum laid down in R.K. Sabharwal's case ((1995) 2 SCC 745), a decision of a Constitution Bench of the Honourable Supreme Court which is relied upon by the counsel for the petitioners in this case also. Ultimately, it was held

in paragraphs 17 and 18 in the following terms:

> "17. In other words, while a reserved category candidate recommended by the Commission without resorting to the relaxed standard will have the option of preference from the reserved category recommended by the Commission by resorting to relaxed standard, but while computing the quota/percentage of reservation he/she will be deemed to have been allotted seat as an open category candidate (i.e. on merit) and not as a reserved category candidate recommended by the Commission by resorting to relaxed standard.
> 18. If a candidate of Scheduled Caste, Scheduled Tribe and Other Backward Class, who has been recommended by the Commission without resorting to the relaxed standard could not get his/her own preference in the merit list, he/she can opt a preference from the reserved category and in such process the choice of preference of the reserved category recommended by resorting to the relaxed standard will be pushed further down but shall be allotted to any of the remaining services/posts in which there are vacancies after allocation of all the candidates who can be allocated to a service/post in accordance with their preference."

In view of the above principles, it is evident that a person belonging to OBC who was included in the merit list and is entitled to OC turn, cannot be pushed to fill up the rotation meant for the same community for filling up the reservation quota. Even if he is thus allotted to fill up a turn available to a reservation candidate, he will be deemed to have been appointed under OC turn, only on the basis of merit.

11. In Sabharwal's case (AIR 1995 SC 1371), their Lordships held in paragraph 4 of the judgment that "When a percentage of reservation is fixed in respect of a particular cadre and the roster indicates the reserve points, it has to be taken that the posts shown at the reserve points are to be filled

from amongst the members of reserve categories and the candidates belonging to the general category are not entitled to be considered for the reserve posts. On the other hand the reserve category candidates can compete for the non-reserve posts and in the event of their appointment to the said posts their number cannot be added and taken into consideration for working out the percentage of reservation..... No general category candidate can be appointed against a slot in the roster which is reserved for the backward class. The fact that considerable number of members of a backward class have been appointed/promoted against general seats in the State Services may be a relevant factor for the State Government to review the question of continuing reservation for the said class but so long as the instructions/Rules providing certain percentage of reservations for the backward classes are operative the same have to be followed. Despite any number of appointees/promotees belonging to the backward classes against the general category posts the given percentage has to be provided in addition. We therefore, see no force in the first contention raised by the learned counsel and reject the same."

12. The principle stated in ILR 1992 (1) Ker. 268 relates to the interpretation of Rule 15(c) that it has to be worked out with reference to the year of reservation. That principle is not the one that is invoked in this case. In the decision reported in ILR 1997 (1) Ker. 319 the dictum laid down is

that as per Rule 15(b) of KS & SSR, if no suitable candidate is available for selection from Scheduled Castes/Scheduled Tribes, selection shall be made from among the community immediately next to the group of community entitled to be appointed according to the turn allotted in the order of rotation. It was held that allotting the slot earmarked for Scheduled Castes to open competition is clearly illegal being against the reservation rules. Herein, the question raised is different. The question considered in 2001 (3) KLT 362 was , as to how a community which has forfeited its benefit be compensated. It was held that the benefit lost to a particular community consequent on the pass over, should be restored to it at the earliest possible opportunity and that as and when a suitable candidate from a community passed over is available, selection should be made from that community by making adjustment as per the rules. In 2001 (3) KLT 765, the said principle was affirmed also. The above decisions will clearly show that the benefit of the turn forfeited to a particular community or to a group of community by reason of it being passed over under sub rules (a) and (b) of rule 15 shall be restored to it, at the earliest opportunity, by making adjustment against the claims of the particular community or group that derived the extra benefit by reason of such passing over. It is true that the said principle has to be followed by the Commission. But the question raised herein is totally different from the issue decided in the said cases. A similar question as the

one which arose in 2001 (3) KLT 765 was considered by an earlier Division Bench of this court in **Cochin University of Science and Technology v. Mohammed Aslam** (1996 (1) KLT 214). Their Lordships held that "at a particular point of time, if a suitable candidate is not available from a community as per the turn fixed by the rules, that community should not lose that vacancy forever. At the earliest opportunity that community must get back the benefit from those communities which secured the extra benefit." It is pertinent to note that above were cases where the turn of a community was passed over and the claim for getting back the benefit was considered vis-as-vis the claim of other communities. Even though counsel for the Commission argued that in view of the above dictum, the Commission had to first give the temporary pass over turn to Rank No.1. , the question is whether rank No.1 who was advised against that temporary pass over turn could be counted against a reservation turn while he was entitled to be considered for open category turn. Going by Rule 14(c) he is the candidate who should have been advised on merit. By that process the OC turn of rank No.1 has been lost, resulting in losing of the chance of advice for a Muslim from the supplementary list. Thus, even though as pointed out by the counsel for the Commission, going by the principles of rotation the community is entitled for restoration of the benefit but it should not be at the expense of a candidate from the same community entitled to be

advised on open merit in the OC turn. Even if by giving the turn there will be restoration of the benefit to the community, going by the dictum laid down in 2006 (2) KLT 375 (SC) he will be deemed to have been appointed as an open category candidate and not as a reserved category candidate. Hence, it is evident that the method adopted by the Commission is not in accordance with the relevant rules.

13. It was argued by the counsel for the Commission that rule 14(b) is only subject to the provisions of Rules 15 to 17. I am afraid the said contention cannot be accepted. The salutory principle adopted in Rule 14 (b) is that persons belonging to Scheduled Castes/Scheduled Tribes and Other Backward Classes are entitled to be considered on their own merit and where candidates are selected on that basis, then the number of posts reserved for Scheduled Castes/Scheduled Tribes and Other Backward Classes as the case may be, shall not in any way be affected. (emphasis supplied). In fact, this is not subject to the provisions of Rules 15, 16 or 17. Therefore, the principles stated by this court in 1997 (2) KLT 218 squarely applies here and the persons who have been advised in the turn for Muslim reserved candidates and who were entitled to be advised in the OC turn cannot be treated as candidates appointed in reserved vacancies for Muslims.

14. In view of the above, the position has to be worked out again, in

accordance with the correct legal principles. Even though the Commission has taken a stand that it will affect candidates who have already been advised and appointed, counsel for the petitioners pointed out that the details of those candidates are not available from the pleadings of the Commission for specifically impleading them as respondents in the writ petition. However, it has been pointed out that the Commission is having power under Rule 3(c) of KS & SSR to cancel the advice for appointment of any candidate to any service if it is subsequently found that such advice was made under some mistake. Of course, as per the second proviso, such candidates will have to be given a reasonable opportunity of being heard in the matter. Therefore, the said procedure can be adopted here by the Commission, if circumstances warrant the same. The period of the ranked list is also not over.

15. Hence, the writ petition is allowed and the Public Service Commission is directed to set right the irregularities pointed out above and advise the eligible candidates belonging to Muslim community from the supplementary list. If any person who has been advised and appointed, has to be issued notice, the Commission will resort to the power conferred under Rule 3(c) of KS & SSR. The needful in the matter shall be done within a

period of four months from the date of receipt of a copy of this judgment. No costs.

(T.R. Ramachandran Nair, Judge.)

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